STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

 SUPERIOR COURT DIVISION

COUNTY OF XXXX FILE NO.

STATE OF NORTH CAROLINA )

 )

v. )

)

DEFENDANT , )

 Defendant. )

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**MOTION TO PRESERVE AND PROVIDE DOCUMENTS RELATED**

**TO THE JURY FORMATION PROCESS; proposed order**

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NOW COMES Defendant, by and through counsel, and respectfully moves this Court to order preservation of documentation related to the jury formation process in [YOUR COUNTY] so counsel may adequately investigate, develop and, if necessary, litigate claims concerning whether the venire in this case represents a fair cross section of the [YOUR COUNTY] community. Such information is necessary to ensure Defendant’s rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 24 and 26 of the North Carolina Constitution, *Duren v. Missouri*, 439 U.S. 357 (1979), and *State v. Williams*, 355 N.C. 501, 549 (2002).

**Factual Basis**

Every two years (i.e. biennium) [replace with “Every year” if in a county with annual list updates], a "raw" list of potential jurors is sent from the Department of Motor Vehicles ("DMV") to the [YOUR COUNTY] Clerk of Superior Court pursuant to N.C. Gen. Stat. §§ 9-2 and 20-43.4. This "raw" list contains registered voters and licensed drivers in the [YOUR COUNTY]. Upon information and belief, beginning in 2020, this "raw" list also includes race and ethnicity information of the potential jurors. After receiving the "raw" list, various editing of the list takes place utilizing both computer software and manual editing by the jury commission. After editing, the "master" jury list for the [YOUR COUNTY] is formed, and jurors for the grand jury and petit juries are randomly summonsed from this "master" list for grand jury sessions and trials occurring during the upcoming two-year [or one-year] period. According to N.C. Gen. Stat. § 9-7, "[t]he names of persons summonsed for jury service and the date or dates on which each person served" is recorded on the master jury list and retained for two years.

 According to the attached retention policies from the Administrative Office of the Courts, the original “raw” list sent by the DMV to the [YOUR COUNTY] is retained only until the “administrative/reference value to the clerk has ended” and then the list is “destroy[ed] without NCAOC approval.” See Exhibit 1, Page 9.6. Upon information and belief, this list typically arrives to the clerk’s office via a thumb drive in the Fall before the next biennium. Therefore, this “raw” list from the DMV that is used to form the “master” jury list for the 2022-2023 biennium will arrive in the clerk’s office in the Fall of 2021. The Clerk’s office does not have the capability to recreate the “raw” list from the resulting “master” list once the raw list is destroyed/disposed. The “raw” list is usually destroyed/disposed after the “master” jury list for the [YOUR COUNTY] is formed, as the “raw” list has no further “administrative/reference value to the clerk” at that point.

Additionally, upon information and belief, any documentation reflecting the editing process from the "raw" list to the finalized "master" jury list for [YOUR COUNTY] is not currently preserved. Finally, upon information and belief, any returned summons marked "undeliverable," are not recorded or preserved.

**Law and Argument**

Defendant is seeking information in order to investigate whether the venire in his case comports with his Sixth Amendment rights to an impartial jury, interpreted by *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) to mean a jury selected from a fair cross-section of the community. The inherent importance of fairly representing all groups in jury service has long been recognized. “When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.” *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

To demonstrate a fair cross-section violation, a defendant must show “[1] that the group alleged to be excluded is a ‘distinctive’ group in the community; [2] that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and [3] that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.” *State v. Williams*, 355 N.C. 501 (2002) (quoting *Duren v. Missouri*, 439 U.S. 357 (1979)).

Defendant has no burden to demonstrate issues of underrepresentation of distinctive groups as a threshold to access the information he is seeking. Requiring him to meet such a burden would be “putting the proverbial cart before the horse by requiring defendants to demonstrate a problem with the jury selection system in order to access records that would tell them whether there is a problem with the jury selection system,” and would be inconsistent with rulings from federal courts. Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IowaL. Rev. 1719, 1757 (2016); *See also United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996) (“[t]o avail himself of the right of access to jury selection records, a litigant need only allege that he is preparing a motion to challenge the jury selection process.”); *Government of Canal Zone v. Davis*, 592 F.2d 887 889 (5th Cir. 1979); *United States v. Lawson*, 670 F.2d 923 (10th Cir. 1982); *United States v. Alden*, 776 F.2d 771, 773 (8th Cir. 1985); *United States v. Macano-Garcia*, 622 F.2d 12, 18 (1st Cir. 1980); *United States v. Beaty*, 465 F.2d 1376, 1380 (9th Cir. 1972). "This cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." *State ex rel. Garrett v. Saitz,* 594 S.W.2d 606, 608 (Mo. 1980).

1. **Standards for demonstrating “systematic exclusion”**

The information sought is critical and necessary in determining the third prong of the *Duren* test – whether any underrepresentation in Defendant’s venire is due to systematic exclusion of a distinctive group in the jury selection process. Because the *Duren* test falls under the Sixth Amendment right to a fair jury, the question is whether there is underrepresentation of a distinctive group due to systematic exclusion, not whether there is intent to discriminate. *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis in original) (internal citations omitted), *rev’d on other grounds,* 426 F.3d 1 (1st Cir. 2005); *see also United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (observing that the Sixth Amendment is stricter than the Equal Protection Clause because it is unconcerned with motive)

“Systematic exclusion” may occur as a result of any number of typically invisible steps in the jury formation process: for example, a glitch in a software system that inadvertently removes residents living within a certain zip code from the juror list. *See United States v. Jackman,* 46 F.3d 1240, 1242-43 (2d Cir. 1995)(citing *United States v. Osorio*, 801 F. Supp. 966, 972-73) (D. Conn. 1992)). Or "systematic exclusion" may occur as it did in *Duren* where an inherent product of the jury selection mechanism results in underrepresentation, or if the underrepresentation results from a rule or practice over which the state actor had control. *Id.,* 439 U.S. at 366 (violation found where Missouri’s jury selection process systematically excluded women from the jury pool). Without the opportunity to examine the process by which the juror list is formed, systematic factors producing underrepresentation remain hidden and their effect on the jury list unabated. "One denial leads to another: denial of the motion for disclosure leaves [defendant] with no way to prove his…jury did not represent a cross-section of the community, and that would be a denial of due process." *Garrett*, 594 S.W.2d at 608.

The *Duren* three-part test places the burden on the defendant to show systematic exclusion. Without access to the information requested, the Defendant cannot investigate whether a meritorious challenge exists. See, e.g., *State v. Gettys*, 243 N.C. App. 590 (2015) (rejecting fair-cross challenge to County’s use of a computer program to select venire members where defendant failed to show systemic exclusion, even where distinctive groups are underrepresented in a given venire); *State v. Bowman*, 349 N.C. 459 (1998) (“[d]efendant’s only evidence in the instant case consisted of the statistical makeup of this particular jury venire”; court found that evidence failed to show systemic exclusion under third prong of *Duren* test).

1. **Right to Information**

The Supreme Court has recognized that access to jury formation records is necessary for enforcing the fair cross-section guarantee: “Without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.” *Test v. United States*, 420 U.S. 28, 30 (1975). Federal law guarantees access to such information by statute through the Jury Service and Selection Act (“JSSA”). 28 U.S.C. §§ 1861-1878 (2012). While North Carolina does not have a parallel statute, Defendant nevertheless has a constitutional right to information related to his fair cross-section challenge. Courts in other states that do not have statutory equivalents to the JSSA nonetheless have granted the defendant’s requests for jury formation discovery on constitutional grounds, recognizing that such access is necessary to the enforcement of the fair cross-section right. Most recently in Iowa, the state’s highest court recognized that while it had a similar statutory counterpart to the JSSA, it nevertheless found a constitutional right to the defendant’s requests for information about the jury panel for the prior six month period. *State v. Plain*, 898 N.W.2d 801, 828 (2017). (“[T]he constitutional fair-cross section purpose alone is sufficient to require access to the information necessary to prove a prima facie case.”). The court further stated, “[t]o the extent Plaindid not meet his prima facie case with respect to the third prong of the test, we conclude he lacked the opportunity to do so because he was not provided access to the records to which he was entitled.” *Id.*

Courts in three other jurisdictions have similarly affirmed the constitutional right to access the information Defendant is seeking, without any threshold showing of a fair cross-section violation. *See Garrett*,594 S.W.2d at 608 (finding “[t]he court is bound…by the United States Supreme Court's determination of a state court defendant's constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community” where a defendant requested data maintained by the circuit clerk relating to the master grand jury list that he could use to determine race and ethnicity data.); *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014) (finding “this court is bound by Supreme Court precedent, and... a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community” when defendant made a pretrial request for information that would identify the racial composition of the grand jury); *State v. Ciba-Geigy Corp*., 573 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1990) (affirming defendants' claim to right to information based “upon both federal and state constitutional precepts” when he requested information concerning the race and ethnic background of the grand jurors.) As stated in *Garrett,* "[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." 594 S.W. 2d at 608.

While these cases involved the request for information about the grand jury lists, the request for information also invariably applies to the formation of the venire for the trial jury, as the law is clear that Defendant has a federal and state right to a petit jury drawn from a fair cross section of the community. As such, Defendant similarly has a constitutional right to access the requested information in order to preserve and ensure his constitutional right to a fair trial.

**CONCLUSION**

Therefore, Defendant requests that the following detailed information is preserved and provided to him so that he may, through counsel, investigate and potentially litigate challenges to the jury venire in his case. Defendant does not otherwise have access to this information unless court actors voluntarily gather such information or the Court orders that they do so.

WHEREFORE, Defendant requests the Court grant the following requested relief:

That the following information is preserved and provided to counsel for the Defendant:

* 1. Any documentation reflecting the jury formation process maintained by the Office of the Clerk of Court and the jury software program it utilizes; and
	2. [YOUR COUNTY] Jury Commission meeting minutes for creating the [YOUR COUNTY] “master” jury list for the 2022-2023 biennium [replace with “2022” and strike “biennium” if in county with annual list updates]; and
	3. A copy of the "raw" list of potential jurors, which includes the potential juror's name, race, ethnicity, gender and zip code for [YOUR COUNTY] that is created by the DMV and sent to the Clerk of Court; and
	4. All materials, in electronic or paper form, including but not limited to any hand-made edits by the Jury Commission, that are made in the process of editing this "raw" list of potential jurors for [YOUR COUNTY] received by the DMV in order to create the "master" list of potential jurors; and
	5. An electronic copy of the [YOUR COUNTY] Master Jury List for the 2022-2023 biennium [replace with “2022” and strike “biennium” if in county with annual list updates]; and
	6. An electronic copy of the [YOUR COUNTY] Master Jury list which denotes the names of persons summonsed for jury service and the dates which each person served for the 2018-2019 and 2020-2021 bienniums [replace with “2019, 2020 and 2021” and strike “bienniums” if in county with annual list updates]; and
	7. An electronic copy of list of jurors who were summonsed, and a notation of those who appeared, for any trial sessions of superior court between January 1, 2022 and [insert date certain for your defendant’s trial or leave as “and defendant’s trial”]; and
	8. An electronic copy of the list of jurors summonsed for the session of court for defendant’s trial; and
	9. All summons returned as "undeliverable," or otherwise returned as not served on the potential juror for any trial sessions of superior court between January 1, 2022 and [insert date certain for your defendant’s trial or leave as “and defendant’s trial”], including defendant’s trial, are preserved and made available for inspection and copying; and
	10. A response in writing of what steps, if any, [YOUR COUNTY] takes to address undeliverable summons; and
	11. Any policies and procedures for addressing deferrals and excuses prior to jury service; and
	12. Any documentation reflecting the excusal or deferral of jurors prior to their appearance in court for jury service in the defendant’s trial is preserved and made available for inspection and copying; and
	13. A response in writing of what steps, if any, [YOUR COUNTY] takes to address jurors not reporting when summonsed.
	14. An electronic copy of the list of jurors who appear for jury service for the session of court for defendant’s trial; and
	15. Any and all other relief the Court deems appropriate to effectuate the purpose of this Motion.

Respectfully submitted, this the \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2021.

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SIGNATURE LINE

**CERTIFICATE OF SERVICE**

 THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion on the State of North Carolina by hand delivery:

DA Office

Clerk of Superior Court [Be sure to serve a copy on the Clerk]

This the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2021.

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